



Commonwealth of Massachusetts State Ethics Commission

One Ashburton Place, Room 619, Boston, MA, 02108
phone: 617-727-0060, fax: 617-723-5851



CONFLICT OF INTEREST OPINION EC-COI-93-15

FACTS:

You are a Selectman in a Town (Town). You are also the part owner of an engineering and surveying business (the Corporation). The Corporation is incorporated in New Hampshire with an office in Massachusetts. The Corporation provides technical services to some Massachusetts municipalities, but it predominantly serves private individuals and companies. The Corporation has not previously served as a consultant for the Town.

The Corporation now has the opportunity to work on land development projects for privately held land in the Town. In such situations, the Corporation would provide engineering and surveying services to private parties, but would not have an equity interest in the land or the development. Specifically, you contemplate that the Corporation would prepare drawings on behalf of private parties for submission to the Town's Planning Board for approval as part of a subdivision plan pursuant to G.L. c. 41, §81K *et seq.* In addition, the Corporation may prepare documents for submission to the Town Conservation Commission for approval under the Wetlands Protection Act, G.L. c. 131, §40 or in the context of a septic system approval by the Town's Board of Health.

The other principal of the Corporation is a registered land surveyor. You are a registered professional engineer. It is the Corporation's policy that you and the other principal stamp and seal all plans and other professional documents. You include your professional seal on documents for reasons of quality control and liability exposure. In addition, a professional stamp/seal is sometimes required by the general laws or by a local government to be included on certain documents submitted for municipal approval. Your professional stamp and seal contains your name as well as your designation as a professional engineer.

QUESTIONS:

1. Does G.L. c. 268A permit you to receive compensation for the preparation of documents which will be submitted to a Town agency?
2. Does G.L. c. 268A permit you to place your professional seal on documents which will be submitted to a Town agency?

ANSWERS:

1. No.
2. No.

DISCUSSION:

As a selectman, you are a municipal employee^{1/} for purposes of applying the conflict of interest law.^{2/}

1. Receipt of Compensation:

Section 17(a) prohibits a municipal employee from receiving compensation from anyone other than the municipality in connection with a particular matter^{3/} in which the municipality is a party or has a direct and substantial interest.

By definition, submissions and applications requiring approval of a municipal agency are particular matters in which the municipality has a direct and substantial interest. *See EC-COI-86-03*. In *EC-COI-93-5*, we stated that the receipt of private compensation by a full-time state employee for making submissions or reporting information to a state agency would violate §4(a) (state employee restriction which parallels §17). In addition, where §17(a) uses the language “in connection with” a particular matter, compensation for work done pursuant to or in relation to a submission or application raises an issue under §17(a). For example, the Commission has previously held that work done pursuant to a building permit (a particular matter) is presumptively in connection with that permit. Absent specific circumstances indicating that a municipal employee is one of a number of privately paid employees on a construction project and has no responsibility for dealing with the municipal government, a public employee’s receipt of private compensation for work pursuant to a building permit will violate §17(a). *See EC-COI-88-9; contrast 87-31, n.7*.

In applying §17(a) to your facts, we find that any private compensation you would receive for preparing plans and other documents which will be submitted to any Town board or agency would be considered in relation to a particular matter in which the Town has a direct and substantial interest, i.e., an application requiring municipal approval. *See EC-COI-92-18* (county employee may not receive compensation from private investment firm for preparing proposal which the firm intends to submit to county agency). Even if you would not be receiving compensation for actually making a submission or filing documents in relation to an application, where the documents which you or other employees of the Corporation prepare are required by a municipal agency, are relied upon by a municipal agency in making its decisions, and are an integral part of an application submitted to the municipal agency, we would find that the preparation of such documents is “in relation to” the application or submission, a particular matter within the meaning of the §17(a) restriction. You could not, therefore, receive compensation paid by a private client for the preparation of documents to be submitted to any Town agency. In addition, you could not receive compensation in your position with the Corporation for supervising or approving the work of other Corporation employees who would be preparing documents which would then be submitted to a Town agency. *See EC-COI-92-1*.

If, however, the firm were to prepare such submissions on an unpaid basis, an issue would not be raised under §17(a). Similarly, if the Corporation were to utilize fees generated from particular matters in which the Town has a direct and substantial interest to pay the salaries of other corporate employees or to otherwise segregate its receivables to avoid your receipt of any such fees, an issue under §17(a) will be avoided. *See EC-COI-85-21*.^{4/}

2. Use of Professional Stamp or Seal.

Section 17(c) prohibits a municipal employee from acting as attorney or agent for anyone other than the municipality in connection with a particular matter in which the municipality is a party or has a direct and substantial interest. The Commission has, on numerous occasions, held that, for purposes of the conflict law, acting as an agent includes signing contracts on behalf of an individual or entity, acting as a spokesperson or advocate for another in an application process, presenting supporting information to a public agency or representing another in any way before a public agency. *See EC-COI-92-18; 85-58; 84-6; 83-78*.

In *EC-COI-92-25* we further explained the meaning of agency within the context of the conflict of interest law:

[i]n general, a public employee acts as agent for the purpose of G.L. c. 268A when he or she speaks or acts on behalf of another in a representational capacity. *See Commonwealth v. Newman*, 32 Mass. App. Ct. 148, 150 (1992); *Commonwealth v. Cola*, 18 Mass. App. Ct. 598, 610-11 (1984), *habeas corpus granted on other grounds sub nom. Cola v. Reardon*, 787 F.2d 681 (1st Cir. 1986). We have repeatedly given as examples of acting as agent appearing before a government agency on behalf of another, submitting an application or other document to the government for another, or serving as another’s spokesperson. *See, e.g., EC-COI-92-18; In re Reynolds*, 1989 SEC 423, 427; *Commission Advisory No. 13 (Agency)* 1988.

The issue here is whether professionally stamping or sealing documents, which are then submitted to a Town board or committee, constitutes representation of, or personally appearing on behalf of, someone other than the Town.

An agency relationship within the context of the conflict of interest law comes into play when “there is a palpable link between the private person doing business with the government and the government employee, whereby the latter is bound — or appears to be bound — to speak and act on behalf of the former.” *Commonwealth v. Newman, supra.*, at 150. Here, in professionally stamping a document which will be submitted to a Town board, you appear to be acting on behalf of the Corporation’s client. At the very least, there is an appearance (if not an obligation) that you are ultimately bound to speak on behalf of the Corporation’s client in relation to that document if its contents are questioned by a municipal agency. Moreover, your statement that the seal is affixed for liability reasons further indicates to us an acknowledgment (if not an intention) that you will be bound or potentially bound to take legal responsibility for the contents of the document on behalf of the client.

Additionally, in the case of a professional engineer, pursuant to state regulation, a professional stamp indicates that a registered professional engineer or someone under his direct personal supervision has prepared the document. *See* 250 CMR 3.05:(3). Presumably, the fact that a document has been prepared by or with the supervision of a professional engineer is meant to communicate on behalf of the party for whom the document was prepared, a certain level of quality and accuracy such that the document may be relied upon. Indeed, you state that such a stamp is placed on the document, among other reasons, for quality control. In other words, in placing your professional stamp on a document to be submitted to a Town board, you are in fact communicating in a representational capacity (on behalf of the Corporation’s client) that the contents of the document are correct and accurate and the substance of the document may be relied upon by the Town board in granting its approval.

We therefore conclude that when you place your professional stamp on a document, you do so in a representational capacity, that is, on behalf of your Corporation’s client. Such activity constitutes acting as agent within the meaning of the §17(c) prohibition.

In summary, §17 will prohibit your receipt of income in relation to the preparation of documents which will be submitted to any Town agency. In addition, you may not act as agent for any of the Corporation’s clients by submitting documents or applications on behalf of clients, or by otherwise representing clients before any Town agency. Finally, even if you do not receive compensation derived from the fees for preparing documents to be submitted to a Town board or agency, you cannot include your professional stamp or seal on such documents.

DATE AUTHORIZED: June 22, 1993

¹“Municipal employee,” a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis, but excluding (1) elected members of a town meeting and (2) members of a charter commission established under Article LXXXIX of the Amendments to the Constitution. G.L. c. 268A, §1(g).

²By definition, selectmen in a town with a population greater than 10,000 inhabitants may not be special municipal employees. G.L. c. 268A, §1(n).

³“Particular matter,” any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

⁴We note that other employees of the Corporation would not be restricted from appearing before (in person or by making submissions to) Town boards or agencies or from being compensated by the Corporation in connection therewith. As explained above, however, you cannot supervise such employees, nor may you receive any compensation derived from those matters.